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Supreme Court, U.S.
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No. 92-1058

In The

Supreme Court of the United States

October Term, 1992

VICKIE C. STRICKLAND and LELAND CREEL,

Petitioners,

v.

MOTORS INSURANCE CORPORATION (MIC),

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

D. GARY SUTHERLAND
(Counsel of Record)
AMANDA L. ALFORD
HEIDELBERG, SUTHERLAND & McKENZIE
P.O. Box 1070
Hattiesburg, Mississippi 39403
(601) 545-8180

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. In affirming summary judgment on an issue of state law in this diversity case, did the federal court below improperly preempt the Petitioners from invoking the decisional law of the State of Mississippi, and thereby deprive Petitioners of their Seventh Amendment right to trial by jury?

2. When an insurance company has an arguable reason for refusing to pay a claim on a policy which it may have failed to notify the policyholder was being canceled, should the issue of punitive damages be submitted to the jury?

3. Did the court below correctly apply this Court's standard of review on summary judgments and punitive damages?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the court below, as required by Rule 24.1(b) of the rules of this court.

1. Vickie C. Strickland, Plaintiff-Appellant in the court below;

2. Leland Creel, Plaintiff-Appellant in the court below;

3. Motors Insurance Corporation (MIC), Defendant-Appellee in the court below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTER-STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT OF CERTIORARI 4

I. STRICKLAND'S CLAIM THAT SHE WAS IMPROPERLY DEPRIVED OF HER SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY WAS NOT RAISED BELOW, IS WITHOUT MERIT AND IS AN OTHERWISE INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT 4

II. STRICKLAND'S CLAIM THAT MISSISSIPPI LAW ON THE PERTINENT NOTICE QUESTION WAS CLEAR AND WELL ESTABLISHED IS WITHOUT MERIT AND IS ALSO AN INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT 6

III. STRICKLAND'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARDS IS WITHOUT MERIT AND IS AN OTHERWISE INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT 8

IV. STRICKLAND'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED WELL ESTABLISHED PRECEDENTS OF THIS COURT REGARDING PUNITIVE DAMAGES LACKS MERIT AND IS OTHERWISE INAPPROPRIATE FOR REVIEW BY THIS COURT 9

TABLE OF CONTENTS – Continued

Page

V. THE DECISION OF THE FIFTH CIRCUIT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER, DOES NOT DECIDE A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT; NOR HAS IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S JUDICIAL DISCRETION 10

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Berenyi v. Immigration Service, 385 U.S. 630, 636 (1980) 9

Birtcher Corp. v. Diapulse Corp. of America, 17 L.Ed.2d 43, 87 S.Ct. 6 (1966) 8

Branti v. Finkel, 445 U.S. 507, 512 (1980) 9

Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 507 (1969) 6

Miree v. DeKalb County, Georgia, 433 U.S. 25, 33-34 (1977) 5, 10

Rogers v. Missouri Pac. R.R. Co., 352 U.S. 521, 537 (1957) 6, 9

Tennessee v. Dunlap, 426 U.S. 312, 316 (1976) 5, 10

United States v. Johnson, 268 U.S. 220, 227 (1925) 6

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MOTORS INSURANCE CORPORATION (MIC),

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, Motors Insurance Corporation (MIC), respectfully requests that this Court deny the petition for a writ of certiorari.

COUNTER-STATEMENT OF THE CASE

A comprehensive and accurate statement of the facts and prior proceedings in this case is set forth in the Fifth Circuit's opinion, attachment "A" of the appendix to the petition for a writ of certiorari.

In presenting their version of the case, however, the petitioners raise certain matters which are not germane to the Fifth Circuit's decision, and they represent those matters as absolute facts, even though the "facts" are merely their contentions. In this regard, the petitioners maintain that on several occasions, MIC lied about having sent Ms. Strickland one or more notices pertaining to the renewal of insurance for the year 1986. Far from being a "fact", though, this assertion that MIC lied is nothing more than a contention by the petitioners. Specifically, there has never been any findings or admissions in the record to support the petitioners' assertion that "[t]his letter [R. 785], in its entirety, was false and was known to be false at the time it was written by respondent MIC. (pet. p. 4). When this case is once again before the district court, MIC can and will demonstrate that it did not lie or misrepresent any facts, and that it sent Ms. Strickland the requisite statutory notice.

The petitioners also incorrectly suggest that in footnote 1 of its opinion (pet. app. A2), the Fifth Circuit finds that the district court conclusively decided MIC did not mail an extension certificate to Ms. Strickland. No such finding is made, however, and that fact is clarified in the body of the Fifth Circuit's opinion, where the Court notes that "the district court 'perceive[d] its only task to be that of assuming, without concluding, that the extension certificate was not duly mailed and thence proceeding to determine, if possible, the existence, if any, of actual or constructive notice.' " (pet. app. A3).

This explanation of the district court's approach is taken directly from the district court's opinion:

> It is this Court's opinion that the [Fifth Circuit], having before it the record that was before this Court, concluded that whether the defendant actually mailed the extension certificate so as to be in compliance with either Miss. Code Ann. § 83-11-1 **et seq.**, or the policy MIC issued to Strickland, is a jury question.
>
> Based on the aforesaid conclusion, this Court perceives its only task to be that of assuming, without concluding, that the extension certificate was not duly mailed and thence proceeding to determine, if possible, the existence, if any, of actual or constructive notice.

(R. 1218).

It is thus clear that the Fifth Circuit, like the district court before it, merely assumed, for purposes of it own analysis, that MIC had not mailed the extension certificate. The Fifth Circuit did not make any finding on that issue – one way or another. It also did not make any finding about whether MIC failed to comply with any other statutory notice requirement. In the decisions by both the district court and the Fifth Circuit, the question of whether MIC gave the requisite statutory notice is simply reserved for the jury.

That, of course, is why the petitioners' contentions about MIC lying and not giving notice or making an offer of renewal are not germane to the Fifth Circuit's decision: those contentions pertain to the issue of whether MIC complied with applicable statutory notice requirements, but the Fifth Circuit does not address that issue in its decision. It instead addresses questions of "constructive" notice. It decides whether the existence of "actual" or

"constructive" notice excuses an insurer from a possible failure to comply with the notice requirements of an applicable insurance statute.

After resolving that question against MIC, however, the Fifth Circuit still concludes that MIC is entitled to a summary judgment on the petitioners' claim for punitive damages. The Fifth Circuit correctly holds that since the language of the applicable Mississippi statute is less than clear, MIC had an arguable or legitimate reason for construing "actual" or "constructive" notice as an exception to that statute under the facts of this case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. STRICKLAND'S CLAIM THAT SHE WAS IMPROPERLY DEPRIVED OF HER SEVENTH AMENDMENT RIGHT TO TRIAL BY JURY WAS NOT RAISED BELOW, IS WITHOUT MERIT AND IS AN OTHERWISE INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT.

In their petition for a writ of certiorari, the petitioners contend that the Fifth Circuit, in affirming summary judgment on the issue of punitive damages, improperly pre-empted them from invoking the decisional law of the State of Mississippi and thereby deprived them of their Seventh Amendment right to trial by jury. The petitioners, though, never presented such an issue to the Fifth Circuit, either in their original brief, their rebuttal brief, their oral argument, their petition for rehearing or their petition for rehearing en banc. The petitioners also failed to raise that issue in the district court. Since

neither of the lower courts passed on the question, certiorari should not be granted to review it. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977) (where issue not pleaded, argued or briefed in district court or Court of Appeals, Supreme Court would not grant certiorari to consider it); *Tennessee v. Dunlap*, 426 U.S. 312, 316 (1976) (claim not pleaded in complaint or considered by either district court or Court of Appeals is not before Supreme Court on certiorari).

The position which the petitioners have taken on this issue is also without merit. The reason the petitioners are being deprived of a jury trial on their claim for punitive damages is simple: the district court awarded MIC a summary judgment on that claim and the Fifth Circuit upheld that decision. A summary judgment, however, does not violate the Seventh Amendment. Summary judgments were deliberately designed to remove claims from a jury.

For their part, moreover, the petitioners readily acknowledge that in appropriate instances, summary judgments can and should be granted on claims for punitive damages. (pet. p. 8). So there is no issue over whether the Fifth Circuit improperly deprived the petitioners of a jury trial by upholding the summary judgment awarded to MIC on the punitive damages claim. The petitioners' suggestion to the contrary is completely lacking in merit.

But the petitioners are using that constitutional window dressing to deflect attention from the real issue. The real issue, of course, is not whether the petitioners have been improperly deprived of a right to trial by jury, but

whether the Fifth Circuit properly awarded a summary judgment to MIC under the facts of this case and applicable Mississippi law.

Attention is being deflected from that issue, since it does not present an appropriate question on which to grant certiorari. In order to reconsider the propriety of the summary judgment upheld by the Fifth Circuit, this Court would not only have to engage in an extensive canvassing of the facts, but it would also have to make an extensive evaluation of Mississippi law governing punitive damages in insurance disputes. The petitioners are claiming, for example, that the Fifth Circuit misconstrued Mississippi law by following and applying its own prior decisions interpreting the law of Mississippi, rather than the decisions of the Mississippi Supreme Court.

But the interpretation of state law and fact canvassing are not tasks to be served by a grant of certiorari. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 507 (1969); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 537 (1957); *United States v. Johnson*, 268 U.S. 220, 227 (1925). The petitioners' writ should be denied for those reasons as well.

II. STRICKLAND'S CLAIM THAT MISSISSIPPI LAW ON THE PERTINENT NOTICE QUESTION WAS CLEAR AND WELL ESTABLISHED IS WITHOUT MERIT AND IS ALSO AN INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT

In section II of the petitioners' legal argument, they maintain that the Fifth Circuit erred in treating this as a case of first impression. They contend that contrary to the

Fifth Circuit's holding, there was clear and well settled Mississippi law on the pertinent notice issue. To support this position, they cite a number of allegedly applicable cases in their petition for a writ of certiorari.

But the cases cited and relied upon by the petitioners are inapplicable. Those cases address the notice requirements imposed by various Mississippi statutes. The pertinent notice issue addressed in the Fifth Circuit's decision, however, does not involve statutory notice requirements.

The Fifth Circuit was not concerned with whether MIC had complied with certain statutory notice provisions. It focused, instead, on whether the doctrine of constructive notice can be applied in Mississippi to this type of insurance dispute, so as to excuse any failure to satisfy the notice requirements set forth in the statutes. Like the district court before it, the Fifth Circuit merely assumed, solely for the sake of its own analysis, that MIC had not complied with certain statutory notice provisions. It then examined whether MIC was entitled to a summary judgment anyway under the doctrine of constructive notice.

The Fifth Circuit ultimately concluded that constructive notice is not available in this type of insurance dispute, but, in doing so, it correctly found that the doctrine's applicability to such a situation had not been previously considered in a reported decision. The petitioners, moreover, are not disputing that fact. They have failed to cite any Mississippi case addressing the applicability of constructive notice to the type of insurance dispute present here.

The petitioners, therefore, are completely incorrect in contending that Mississippi law on the pertinent constructive notice issue was clear and well settled. In addition, the petitioners also have no basis for asking this Court to review the issue. In order to reexamine that question, this Court would have to engage in an extensive interpretation of state law, something which is not a task to be served by a grant of certiorari. *Birtcher Corp. v. Diapulse Corp. of America*, 17 L.Ed.2d 43, 87 S.Ct. 6 (1966).

III. STRICKLAND'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED THE SUMMARY JUDGMENT STANDARDS IS WITHOUT MERIT AND IS AN OTHERWISE INAPPROPRIATE ISSUE FOR REVIEW BY THIS COURT

In section III of their argument, the petitioners maintain that the Fifth Circuit failed to apply the appropriate standard in granting a summary judgment on the issue of punitive damages. Although the petitioners cite numerous cases on the standards for awarding a summary judgment, they completely fail to explain how the Fifth Circuit misapplied any of those standards. In addition, in the final paragraph of section III, the petitioners plainly reveal that they are not actually complaining about the alleged misapplication of the summary judgment standards. Rather, their real complaints are based on the Fifth Circuit's assessment of the facts and its application of the Mississippi law on punitive damages in insurance disputes.

Consequently, in order to review the true issues presented by the petitioners, this Court would have to construe Mississippi law and engage in extensive fact canvassing. This Court has ruled on numerous occasions, however, that it should not grant a writ of certiorari merely to review the evidence, discuss the facts and interpret state law. *Berenyi v. Immigration Service*, 385 U.S. 630, 636 (1980); *Branti v. Finkel*, 445 U.S. 507, 512 (1980); *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 521, 537 (1957).

IV. STRICKLAND'S ASSERTION THAT THE FIFTH CIRCUIT MISAPPLIED WELL ESTABLISHED PRECEDENTS OF THIS COURT REGARDING PUNITIVE DAMAGES LACKS MERIT AND IS OTHERWISE INAPPROPRIATE FOR REVIEW BY THIS COURT

In section IV of their argument, the petitioners maintain that the Fifth Circuit failed to follow this Court's precedents on punitive damages. They then cite and briefly explain a number of this Court's cases on the constitutional aspects of punitive damage awards. Thereafter, the petitioners never attempt to explain how the Fifth Circuit failed to follow any of those decisions. Instead, they shift to a discussion of Mississippi law and the facts of this case, and, for that reason, this Court should not grant certiorari to engage in fact canvassing and the interpretation of state law.

This is, moreover, the first time that the petitioners have presented this issue for review. Since they failed to raise the issue in either the district court or the Court of Appeals, certiorari should not be granted to review it.

Miree v. DeKalb County, Georgia, 433 U.S. 25, 33-34 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 (1976).

V. THE DECISION OF THE FIFTH CIRCUIT BELOW DOES NOT CONFLICT WITH THE DECISION OF ANOTHER UNITED STATES COURT OF APPEALS ON THE SAME MATTER, DOES NOT DECIDE A FEDERAL QUESTION IN A WAY IN CONFLICT WITH A STATE COURT OF LAST RESORT; NOR HAS IT DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR AN EXERCISE OF THIS COURT'S JUDICIAL DISCRETION

Under Rule 10 of the Supreme Court Rules, a petition for a writ of certiorari is a matter of judicial discretion, and it will only be granted for special and important reasons. Rule 10 then cites several reasons which warrant a granting of the writ, but none of those reasons apply to this case. First, the Fifth Circuit's decision is not in conflict with a decision by another federal court of appeals. Second, the Fifth Circuit's decision does not decide a federal question in a way which conflicts with a decision by a state court of last resort. Third, the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings. There has certainly been no obvious or exceptional showing of error.

For these reasons, there is no important or compelling reason for this Court to accept review of this case and reexamine the facts which have already been thoroughly examined by the district court and the Fifth Circuit. There is no important legal controversy at stake, nor are there any constitutional questions at issue. Rather,

this case turns solely on its own facts and has no importance other than to the litigants themselves.

CONCLUSION

The petitioners in this action wish to have this case heard solely on the issue of whether they are entitled to punitive damages under the facts of this case. But both the district court and the Fifth Circuit, in denying punitive damages to the petitioners, correctly applied appropriate Mississippi legal standards and reached a correct result. For the foregoing reasons, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

D. GARY SUTHERLAND
(Counsel of Record)
AMANDA L. ALFORD
HEIDELBERG, SUTHERLAND
& MCKENZIE
P.O. Box 1070
Hattiesburg, MS 39403
Telephone: (601) 545-8180

Attorneys for Respondent,
Motors Insurance Corporation